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NO. 82-757

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES W. COTHRAN, JR., JAMES F. JOHNSON, and BOBBY RICHARDSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED.

Whether the Court of Appeals erred in holding that the Petitioners are required to show prejudice whenever the trial judge interfered with the exercise of peremptory challenges and refused to allow defense counsel to collaborate on the use of individual challenges during the jury selection process.

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UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____

The Petitioners, James W. Cothran, Jr., James F. Johnson and Bobby Richardson respectfully petition the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit from the denial of a Rehearing En Banc of the decision of a three-judge panel of this Court dated June 10, 1982 wherein the convictions of Cothran, Johnson and Richardson were affirmed. The Order of the Fourth Circuit denying the Rehearing was filed on September 2,

1982.

The jurisdiction of the Court is invoked pursuant to 28 USC §1254.

In support of this Petition, the Petitioners respectfully submit that the refusal of the trial judge to allow defense counsel to collaborate on the use of individual challenges of jurors was error and Petitioners are not required to show any evidence of resulting prejudice.

In the decision of the three-judge panel, the Court may have overlooked the authorities which eliminate the requirement of the showing of prejudice whenever the trial judge interferes with the handling of the manner in which peremptory challeges are exercised by defense counsel.

The opinion of the three-judge panel of the Fourth Circuit has decided an important question of Federal law which has not been, but should be settled by the Supreme Court of the United States and has departed from the

accepted and usual court of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

James W. Cothran, Jr. was charged in a 10-count mail fraud indictment on December 12, 1978. He was arraigned on December 20, 1978, and entered a plea of not guilty. On January 15, 1979, hearings were held on the various pre-trial Motions filed for Cothran. On February 20, 1979, on Motion of Cothran, the case was continued until May.

A superseding indictment was filed on April 13, 1979, charging Cothran with 10 additional Counts of mail fraud and naming, as additional Defendants, James F. Johnson, Leon Cooper, Bobby Richardson, and A. Frank Harrison, III, M.D.

Cothran was charged in all 20 Counts of the indictment. Johnson was charged in Counts 1, 3, 10, 11, 13, 14, 16, 17, 19, and 20. Cooper was charged in Counts 13, 14, 16,

and 19. Richardson was charged in Counts 6, 7, 8, and 18. Harrison was charged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 19, and 20.

Pretrial Motions hearings were heard on May 8, 1979, and May 22, 1979. A pretrial hearing was held on April 25, 1979, and a pretrial conference was held on April 29, 1979.

The jury trial began on September 5, and ended on September 25, 1979. Cothran was convicted on Counts 1 through 20; Johnson was convicted on Counts 3, 11, and 14 and was acquitted as to Counts 1, 17, and 20; Cooper was convicted on Counts 13, 14, and 16; Richardson was convicted on Counts 6, 7, 8, and 18; Harrison was convicted on Counts 3, 4, 6, 7, 8, 10, 11, 12, 13, 15, 16, and 19 and acquitted as to Counts 1, 2, 17, and 20.

An Appeal was taken by all Defendants. The conviction of Cooper was reversed without a new trial and the convictions of all other

Defendants were affirmed.

STATEMENT OF THE FACTS

During the period of time covered by the indictment, James W. Cothran, Jr. was a duly licensed Attorney practicing law in Columbia, South Carolina; Dr. A. Frank Harrison, III was a duly licensed physician practicing medicine in Columbia; James F. Johnson was the owner and manager of a body shop and wrecker service operating in Columbia; Leon Cooper was a wrecker driver employed by Johnson; and Bobby Richardson was a musician and entertainer who lived in Columbia.

Each Count of the 20-Count indictment referred to a separate traffic accident. The Government theory of the alleged mail fraud scheme charged Cothran with submitting false or inflated insurance claims on behalf of accident victims. The alleged involvement of Johnson, Cooper and Richardson cast them in the role of runners who referred cases to Cothran. Harrison was charged with preparing

medical reports and bills supporting the victims' claims for injuries.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONERS ARE REQUIRED TO SHOW PREJUDICE WHENEVER THE TRIAL JUDGE INTERFERED WITH THE EXERCISE OF PEREMPTORY CHALLENGES AND REFUSED TO ALLOW DEFENSE COUNSEL TO COLLABORATE ON THE USE OF INDIVIDUAL CHALLENGES.

The Petitioners were prevented from consulting with one another so as to obtain the optimal use of the peremptory challenges that the trial court had granted to the Petitioners. Theretofore extensive publicity preceeded the trial because of the number of insurance companies involved. The Petitioners' backgrounds differed vastly. Cothran and Harrison were elected members of a political body and also professional members of the society, an attorney and a physician, respectively. The trial court granted a total of fifteen (15) peremptory challenges to the five

(5) Petitioners.

Peremptory challenges represent an important and vital safeguard to the right to an impartial trial. This right is guaranteed by the Sixth Amendment and goes to the heart of due process granted to every individual. An outright denial of the use of peremptory challenges may affect the integrity of the jury selection process and therefore by implication the fairness of the trial.

> Although 'there is nothing in the Constitution of the United States to grant peremptory challenges,'. . . nonetheless, the challenge is 'one of the most important of the rights secured to the accused' . . . The denial or impairment of the right is reversible error without a showing of prejudice . . . For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its purpose.'

Swain v. Alabama, 380 US 202, 219 (1965).

When a court interferes with the manner in which the exercise of the peremptory challenges is used, even though the inter-

ference is mistaken, reversible error is committed without a showing of prejudice. When interference necessarily reduces the number of peremptory challenges that have been granted an accused, the accused's ability to exercise intelligently his challenges is impaired, giving ground for a reversal, irrespective of prejudice. United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977).

In Swain v. Alabama, 380 U.S. 202, 220 (1964), the United States Supreme Court stated that peremptory challenges should be exercised without any reason and without any control by the Court.

> The essential nature of the peremptory challenges is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. State v. Thompson, 68 Ariz. 386, 206 P. 2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378.

Swain, supra, at 220.

In the United States v. Turner, 558 F.2d 535 (9th Cir. 1977), the trial court granted Turner

and his co-defendants, Bennett and Johnson ten (10) peremptory challenges, to be divided three (3) apiece, but one (1) challenge to be exercised jointly. During voir dire, Turner accepted the jury panel three (3) times as constituted. However, when one juror was excused, Turner tried to exercise a peremptory challenge. The District Court refused to permit Turner to exercise a peremptory challenge on the ground that he had accepted the jury panel three (3) times and had therefore used all of his peremptories. The Ninth Circuit of Appeals reasoned that although the District Court had wide discretion in setting the manner in which the peremptory challenges would be execised, that the manner had unduly restricted Turner's use of his challenges. The dialogue between the trial court and the defense attorneys for Turner and Johnson indicates that the defense attorneys and trial court misunderstood the method that would be exercised with the peremptory challenges.

United States v. Turner, supra, at Note 2, pages 537-38. The Circuit Court of Appeals reversed and remanded for a new trial.

> Nowhere in the record does it appear that counsel had notice before trial that the district court's rules governing peremptories included a provision that each time defense counsel accepted a jury as then constituted, he had forthwith used a peremptory. Moreover, even if notice of that practice had been conveyed, we believe that such a forced waiver is an undue restriction on the exercise of peremptory challenges.

United States v. Turner, supra, at 538. The Ninth Circuit Court of Appeals stated that "the defendant need not show that he was prejudiced by the error". United States v. Turner, supra, at 538 citing Swain v. Alabama, Overruling the District Court, the Ninth Circuit rules "the denial or impairment of the right (of exercising peremptories) is reversible error without a showing of prejudice." United States v. Turner, at 528-39.

The Petitioners claim that the collective number of peremptory challenges

available to them was limited, thereby reducing the overall advantage of the fifteen (15) peremptory challenges that had been granted to the Petitioners. In United States v. Rucker, 557 D.2d 1046 (4th Cir. 1977), the Fourth Circuit Court of Appeals stated that the failure to use all of the peremptory challenges to strike certain venirenen in question is of no consequence when the ultimate result is the reduction in the number of peremptory challenges available to the defense.

> Even apart from what we have said about the necessity of an adequate voir dire to provide a foundation for the exercise of challenges, we think that an erroneous refusal to excuse a juror for cause constitutes reversible error despite the defendant's use of peremptory challenges, where, as here, as a result of the error, the number of peremptory challenges available to the defense is reduced. United States v. Nell, 526 F.2d.

United States v. Rucker, 577 F.2d 1046, 1049 (4th Cir. 1977).

It is respectfully submitted that a

showing of prejudice is not required when the manner of exercising peremptory challenges by the defense has been muzzled or limited, thereby ultimately reducing the number of peremptory challenges granted to the defense.

> The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. "The end of challenge'; said Coke, 'is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning 3 Inst. 27, c.2. He may, if he chooses, peremptorily challenge on his own dislike, without showing any cause; be may exercise that right without reason or for no reason, arbitrarily and capiciously.'Co. Lit. 156b; 4 Bl. Com. 353; Lewis v. United States, 146 U.S. 376. Any system for the empaneling of a jury that presents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.

Pointer v. United States,151 U.S. 396, 408 (1893). See also, Rosales-Lopez v. United States, 451 U.S. 182, N.6 at 188 (1981); United States v. Carter, 528 D.2d 844, 848

(8th Cir. 1975).

The Appellants respectfully submit that the Court of Appeals erred in holding that interference with the manner of exercising peremptory challenges requires a showing of prejudice. The trial court limited the Petitioners' number and exercise of the fifteen (15) challenges granted, by the refusing of the defense's desire to collaborate jointly on the challenges. The Petitioners never waived their right to exercise the challenges which were reduced by the trial court's instructions not to confer.

CONCLUSION

The ruling in this case will have a profound effect on future cases involving jury selection in criminal matters and this case is entirely appropriate for review by this Court. It involves a question of law, the resolution of which will establish a significant precedent.

It is respectfully submitted, that

for the reasons set forth herein and based on the authorities recited, this court should issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, to review the judgment affirming the convictions of the Petitioners.

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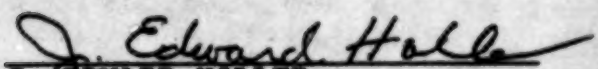

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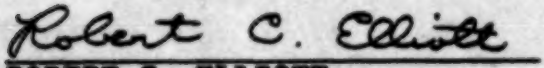

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